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PP

v.

ROCKY USMAN & ANOR

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HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG J
[CRIMINAL CASE NO: MYY-45-4-7-2012]
22 MAY 2013

C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Accused persons jointly charged - Whether identity of deceased established - Chemist report - Whether DNA of both accused persons found on alleged murder weapons - Whether chemist report showed that weapons were used by both accused persons - Whether a prima facie case established*

D

EVIDENCE: *Statements - Witness not called - Whether statements of witness to investigating officer caught by hearsay - Whether statements admissible as exclusion to hearsay rule - Whether exhibits pointed out by absent witness to investigating officer admissible evidence - Whether chemist report negated testimony of witness - Evidence Act 1950, s. 32(1)(i)*

E

On 20 August 2011, one Murtaza bin Ali ('the deceased') was involved in a fight, sustained serious head injuries and was subsequently brought to Miri Hospital for treatment. The deceased died the next day. It transpired that the deceased was murdered by the first and second accused and were jointly charged for murder under s. 302 of the Penal

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Code read together with s. 34 of the Penal Code. The first issue raised by the defence was that the deceased had not been identified as Murtaza bin Ali in the charge and thus, there was a break in the chain of evidence. In the course of trial, PW6 testified that he was requested by one Tadil bin Muin ('Tadil'), to send the deceased to the hospital as

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the deceased was attacked by four persons and sustained injuries. PW6 testified that he did not know the deceased but he heard his nickname was Angkasa. PW6 only knew about the deceased's identity after being informed about it by the deceased's son. Thereafter, PW6 identified the deceased as Murtaza in a photograph. The investigation officer ('PW11')

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testified that the police interviewed some witnesses at the scene of murder including one Marina Aripan ('Marina') and Tadil. PW11 had recorded a statement from Marina, Tadil and Tadil's sister known as Aishah bte Muin ('Aishah'). PW11 testified that Marina told him that the incident happened near to a dustbin about 15 meters behind a house.

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Marina brought PW11 to the house and pointed out a knife which she said was allegedly used by the first accused. A cutter was found at the back of the house which she said was used by the second accused. The

chemist report showed that no blood was detected on the knife, cutter and parang. There was also no blood detected on the six cotton swabs which were used to swab the knife, cutter and parang but an unknown male DNA was developed from the cotton swab. Marina also informed PW11 that she had found a parang which was used by a suspect by the name Binang or Binajar. The police seized the parang and also sent it to the chemist for DNA analysis. PW11 testified that Tadil and Aishah's house was about ten meters away from the scene of the incident. PW11 said Aishah and Tadil told him that they saw the first accused holding a knife, the second accused was holding a cutter and Binajar was holding a parang. Tadil also told PW11 that the deceased informed Tadil that it was Rocky, Hamsa and Binajar that had hit the deceased. However, during trial, Tadil, Aishah and Marina were absent in the court as witnesses even though they were served with subpoenas. The prosecution could not call Tadil and Aishah as witnesses to testify in this case because they could not be traced or be found. The prosecution applied under s. 32(1)(i) of the Evidence Act 1950 ('EA') to tender the witness statement of Tadil and Aishah respectively as evidence which the defence had objected to. Marina was also on the list of prosecution's witnesses but the prosecution did not call her as a witness nor apply to tender her witness statement as evidence. The issues that arose for determination, *inter alia*, were (i) whether the identity of the deceased was established; (ii) whether the statements of Tadil and Aishah to PW11 were caught by hearsay; (iii) whether the statements were admissible under s. 32(1)(i) of the EA; (iv) whether the knife, cutter and parang as pointed out by Marina were admissible evidence; and (v) whether the prosecution established a *prima facie* case.

Held (acquitting and discharging both accused):

(1) The prosecution applied to rely on the two statements of Tadil and Aishah under s. 32(1)(i) of the EA, which was an exception to the general rule that hearsay evidence was not admissible. The onus was on the prosecution to satisfy the court that the requirements of s. 32(1)(i) of the EA was complied with. Before a statement may be admitted under s. 32 of the EA, the condition precedent that the maker of the statement must either be dead or could not be found or had become incapable of giving evidence or that his attendance could not be procured without unreasonable delay or expense must be satisfied. (paras 24 & 25)

(2) Although PW11 testified that he did not see Marina, Tadil and Aishah again after he had recorded their statements, the facts showed that they could be served with the subpoenas before the trial. Although PW11 said that he had taken all the necessary

actions to locate Tadil and Aishah, the steps taken by PW11 to locate them were not explained. The police did not employ due diligence and reasonable exertions to locate Tadil and Aishah as witnesses and to ensure their attendance in court as required. Therefore, the two statements of Tadil and Aishah could not be admitted under s. 32(1)(i) of the EA. (paras 30 & 35)

(3) The statements of Tadil and Aishah to PW11 were hearsay and not admissible in evidence. Tadil and Aishah could not be called as witnesses because they could not be located and had absconded. They did not testify in court what they had said to PW11, in particular as to the truth of what they told to PW11, and they were not subject to cross-examination in the trial. Their allegations made to PW11 that the first accused and second accused persons together with Binajar had hit the deceased during the fight were not tested, not corroborated and not safe as evidence against the accused persons, especially in a capital offence made against them. (para 36)

(4) The statements of Marina to PW11 were hearsay and not admissible in evidence. Since Marina was not called as a witness, her statements to PW11 was not tested and not subjected to cross-examination as to the truth of what she had said to PW11. The knife, the cutter and the parang as pointed out by Marina were admissible evidence. However, the statements of Marina to PW11 that the first accused had used the knife and that the second accused had used the cutter during the fight were hearsay and not admissible. (paras 39 & 40)

(5) The unknown male DNA profile developed from the cotton swab which did not belong to the first and second accused negated the allegations of Tadil, Aishah and Marina that both the accused were holding or had used the knife against the deceased during the fight. Similarly, the chemist report that the second accused's DNA was not found or detected on the cutter negated the allegations of Tadil, Aishah and Marina that the second accused was holding or had used the cutter against the deceased during the fight. (paras 42 & 45)

(6) There was no evidence and the prosecution could not rely on the alleged dying declaration of the deceased that the two accused persons had caused his death. There was also no evidence that there was a plan or meeting of minds of the accused persons to commit the offence for which they were charged. The prosecution had failed to establish that there was a common intention between the two accused persons under s. 34 of the Penal Code and also failed to establish a *prima facie* case. (paras 52 & 53)

Case(s) referred to:
Krishna Rao Gurumuthi v. PP & Another Appeal [2009] 2 CLJ 603 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohd Bakri Belaho v. PP [2008] 2 CLJ 240 CA ***(dist)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***
PP v. Lee Jun Ho & Ors [2009] 4 CLJ 90 HC ***(refd)***
PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC ***(refd)***
PP v. Mohamad Fairus Omar [1997] 3 CLJ Supp 260 HC ***(refd)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), 180
Evidence Act 1950, s. 32(1)(i)
Penal Code, ss. 34, 302

For the prosecution - Mahadthir; DPP
For the accused - Ranbir Singh; M/s Ranbir S Sangha & Co, Advocs
Arthur Lee; M/s Arthur Lee, Lin & Co, Advocs

Reported by Sandra Gabriel

JUDGMENT

Stephen Chung J:

[1] The first and second accuseds were jointly charged, with another person who is still at large, for murder under s. 302 of the Penal Code read together with s. 34 of the Penal Code. The charge is as follows:

> Bahawa kamu bersama-sama dengan seorang lagi yang masih bebas pada tarikh 20.8.2011 jam lebih kurang 7:30 malam, bertempat di tepi jalan, lorong 4-10, Phase 14, Taman Ceria, Bandar Baru Permyjaya, di dalam daerah Miri, di dalam Negeri Sarawak, bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Murtaza bin Ali (L), No: Kad Pengenalan: 600609-12-5719 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[2] In his opening statement, the learned DPP informed the court at the commencement of the trial that the prosecution would be relying on medical, direct and circumstantial evidence. The prosecution would also rely on a dying declaration of the deceased that the two accused persons had caused his death.

[3] The duty of a judge sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused persons. He must subject the evidence of the prosecution to a maximum evaluation: *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[4] On 20 August 2011 at about 7.30pm, at Lorong 4-10, Phase 14, Taman Ceria, Bandar Baru Permyjaya, Miri, Murtaza bin Ali (the deceased) was involved in a fight and was assaulted by a few persons. He sustained serious head injuries in the fight and was subsequently brought to Miri Hospital for treatment but died on 21 August 2011 at 12.15pm.

[5] The first issue raised by the defence was that the deceased had not been identified as Murtaza bin Ali (I/C No. 600609-12-5719) as the victim or the deceased referred to in the charge. It was submitted that the prosecution did not call the wife of the deceased to testify that she had identified the deceased as Murtaza bin Ali and as her husband. It was submitted that PW6 did not know the deceased and had only referred to the deceased as Angkasa or Angkasa bin Alih. The defence submitted that there was a break in the chain of evidence.

[6] PW6 (Sisal bin Sariol) testified that he was requested by Tadil bin Muin (Tadil), whom he knew for about six years, to send a person to hospital. Tadil told him that this person was attacked by four persons ie, Rocky, Erni, Hamsa and Binajar and he was injured. Tadil could not send this person (ie, the deceased) to hospital because Tadil did not have a driving licence. PW6 testified that he did not know the deceased but he heard his nickname was Angkasa. He agreed to send the deceased to Miri Hospital. Tadil did not go with him but someone whom he did not know accompanied him to send the deceased to hospital.

[7] PW6 testified that the next day, after he found out that the deceased had died, he lodged a police report (exh. P43). The deceased's son had shown to him a document with his father's name on it. From that, he knew the deceased was Murtaza bin Ali. During his cross-examination, PW6 was shown a photograph (exh. P39(3)) and he identified Murtaza as the person in the photograph.

[8] An autopsy was performed on the deceased at the mortuary of the hospital on 24 August 2011 at 9.30pm by Dr. Jamail Dolkadir (PW8). The deceased was identified by his wife Amla bte Alpa at the autopsy. PW8 was shown a document of the deceased by the deceased's wife at the autopsy. PW8 suspected that the document was not genuine and requested for it to be verified. PW11 testified that he had verified the document with Jabatan Pendaftaran Negara which confirmed that the document of the deceased was genuine. The autopsy was also witnessed by PW11 who was the investigation officer of this case. PW8 then prepared an autopsy report which was tendered and marked as exh. P44. On the evidence before the court, there was no merit in the submissions of the defence that the deceased had not been identified as Murtaza bin Ali.

[9] PW8 testified that on external examination the deceased sustained the following injuries:

(i) Wound at anterior left vertex area measuring 5.5cm which had been stitched with silk.

(ii) Three wounds at the left temporal area which had been stitched with silk.

(iii) Two superficial cut wounds at left temporal area which were not stitched.

(iv) One superficial cut wound at left lateral upper neck measuring 3cm long, 0.3cm wide and 0.3cm deep.

(v) Small cut wound at posterior left index finger (proximal to the nail) measuring 1.5cm long which had been stitched.

(vi) Linear abrasion left posterior lower arm measuring 15cm long and 0.5cm deep.

(vii) Curve cut wound at left elbow measuring 2cm long, 0.5cm long, 0.5cm deep.

(viii) Linear abrasion at back of body (between scapula bone) measuring 10cm long, 0.3cm wide.

[10] PW8 testified that on opening the scalp, there was haematoma below the skin at left temporal area to left occipital area and also at anterior vertex area. There was comminuted depressed fracture of left temporal bone measuring about 8cm in length. There was left subdural haemorrhage over the left cerebrum extending to the intraparenchymal area. PW8 testified that the cause of death was intracranial bleeding with fracture of skull due to blunt head injuries. PW8 testified that this injury was sufficient in the ordinary course of nature to cause death.

[11] The evidence showed that on 22 August 2011 at about 5am, the police interviewed PW7 who told the police that he sent two persons to Mile 1, Kuala Baram, Miri. He told the police that these two persons went to his house on 20 August 2011 at about 7.30pm and asked him to help them to send them to Mile 1, Kuala Baram.

[12] Based on the information obtained from the interview, on 22 August 2011 at about 9.30am, PW9 led a police party to arrest the first and second accuseds together with another person identified as Elni bin Usman at an unnumbered hut by the sea at Mile 1, Kuala Baram, Miri. PW9 testified that these three persons tried to run away when they saw the police but the police was able to detain them. Subsequently the

three suspects were sent to Miri Hospital for their urine, blood and nail clipping specimens to be taken to be sent to the government chemist for DNA profiling.

[13] PW11 testified that on 21 August 2012 at about 6.31pm he was instructed to become the investigation officer of this case. At about 7.30 p.m he instructed some police personnel to cordon Lorong 4-10, Phase 14, Block Mamutik, Taman Ceria, Bandar Baru Permyjaya, Miri and he then went to CPS Miri. At the police station he saw PW6 who was interviewed by a police inspector and PW11 asked PW6 to accompany him to the scene of the crime.

[14] The police party arrived at the scene at about 9.30pm. It was heavy rain and he said the rain had washed away the blood and other evidence at the scene. He was told three suspects had already run away from the scene. PW11 testified that the police interviewed some witnesses at the scene including Marina Aripan (Marina) and Tadil. PW11 had subsequently recorded a statement from Marina, Tadil and Tadil's sister known as Aishah bte Muin (Aishah).

[15] PW11 testified that Marina told him that the incident happened near to a dustbin about meters behind a suspect's house. Marina brought PW11 to a suspect's house at Sublot 7571-12, Phase 14, Block Mamutik, Taman Ceria, Bandar Baru Permyjaya, Miri. At the house, Marina pointed out a knife (exh. P8B) which was placed beside the sink in the kitchen which she said was used by the first accused. A cutter (exh. P5A) was found at the back of the house which she said was used by the second accused. PW11 used a cotton stick to take a swab of the knife and cutter for DNA. He subsequently sent the swabs, knife and cutter to the chemist for DNA analysis.

[16] On 22 August 2012 at about 1.30pm, PW11 received a phone call from Marina that she had found a parang (exh. P11A) which was kept behind a refrigerator outside the house of the suspect. She told PW11 that this parang was used by a suspect by the name Binang or Binajar. The police seized this parang which was also sent to the chemist for the DNA analysis.

[17] PW11 testified that the house of Tadil and Aishah was about 10 meters from the incident. He said Aishah told him that she saw her father and brother went to the scene and helped the deceased. PW11 said Aishah told him that she saw the first accused holding a knife, the second accused was holding a cutter and Binajar was holding a parang. She said they were standing in front of the deceased. PW11 testified that Tadil also said the same thing to him.

[18] PW11 testified that Tadil told him that Tadil managed to talk with the deceased before the deceased was sent to the hospital. He said Tadil told him that the deceased said to Tadil that Rocky, Hamsa and Binajar had hit the deceased. PW11 said Tadil told him that Tadil then asked Binajar why Binajar hit the deceased. PW11 testified that Tadil told him that Binajar told Tadil that the deceased "datang mengamok dan kami terus hantam dia." PW11 said that Tadil told him that Tadil sent the deceased to PW6's house to ask PW6 to send the deceased to the hospital.

[19] PW11 was not present at the scene when the fighting or assault took place on that night. He did not hear what the deceased said or what the deceased had said to Tadil. He did not see and did not know what happened that night except what Marina, Tadil and Aishah had told him. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made: *Subramaniam v. PP* [1956] 1 LNS 115; [1956] 22 MLJ 220. PW11's testimony was based on what they had told him and was hearsay as to the truth of what they had told him about the incident.

[20] On 6 February 2013, during the trial, the learned DPP advised the court that the next two witnesses were Tadil and Aishah and that they were absent. They had been served with subpoena to appear as witnesses in court. The prosecution then applied for warrants of arrest and the court issued the warrants of arrest against them.

[21] The prosecution could not call Tadil and Aishah as witnesses to testify in this case because they could not be traced or be found. The prosecution applied under s. 32(1)(i) of the Evidence Act (EA) to tender the witness statement of Tadil and Aishah respectively as evidence which the defence had objected to. Marina was also on the list of prosecution's witnesses but the prosecution did not call her as a witness nor apply to tender her witness statement as evidence.

[22] PW11 had testified that he never saw Marina, Tadil and Aishah again after recording their statements. PW11 said that he had taken all the necessary actions to locate Tadil and Aishah. PW10 also explained to the court that he had taken all the necessary actions to locate these two witnesses. The learned DPP submitted that the application to tender the statements of Tadil and Aisah be allowed and to be used as evidence

in court. The learned DPP referred to *Mohd Bakri Belaho v. PP* [2008] 2 CLJ 240 in support of his application. In that case, there was no objection to the admissibility of the statement of that witness who said that he and Jumain had left the house for work. That statement did not allege that the accused in that case had committed murder. That case could be distinguished on the facts of this case.

[23] The defence counsel submitted that they were instructed by both accused persons that they saw both Tadil and Aishah outside and inside the court room at the commencement of the trial. It was submitted that they were available as witnesses at the commencement of the trial. It was submitted that the warrants of arrest were only applied for at a late stage during the prosecution's case before the testimony of PW11, who was the investigation officer and the last prosecution's witness in this trial. It was submitted that if these two witnesses were not available from the commencement of the trial, then the warrants of arrest should have been applied for in the beginning.

[24] It is a fundamental rule of evidence that the best evidence available must be adduced in court. If anything less than the best was to be used as in this case, where the prosecution applied to rely on the two statements of Tadil and Aishah under s. 32(1)(i) EA, which is an exception to the general rule that hearsay evidence is not admissible, the onus is on the prosecution to satisfy the court that the requirements of s. 32(1)(i) EA be complied: see *Sim Tiew Bee v. PP* [1973] 1 LNS 138; [1973] 2 MLJ 200, *PP v. Mogan Ayavoo* [2004] 3 CLJ 623, *PP v. Mohamad Fairus bin Omar* [1997] 3 CLJ Supp 260; [1997] 5 MLJ 57.

[25] Before a statement may be admitted under s. 32 of the EA, the condition precedent under the section must be satisfied ie, the maker of the statement must either be dead or cannot be found or has become incapable of giving evidence or that his attendance cannot be procured without unreasonable delay or expense. In the present case, the applicable preconditions would either be that the witness could not be found or that the attendance of the witness could not be procured without unreasonable delay or expense: *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747.

[26] This case was fixed for continuation of trial on 21 February 2013 but the warrants of arrest were not issued by the court and the SAR was asked to explain why warrants of arrest were not issued since 6 February 2013. The court then made the order that the warrants of arrest be issued and handed over to the police by 12.30 noon on 21 February 2013.

[27] The case was then scheduled for continuation of the trial for 18 March 2013 at 9am. On 15 March 2013 at 4.30pm, PW10 received instructions from his office to trace Tadil and Aishah. On 17 March 2013 at 9pm he went to the last known address of Tadil and Aishah but he could not find them at the address. He testified that the house was locked and there was no light in the house. He said he interviewed the neighbours but the neighbours did not know the movements of these two witnesses.

[28] PW10 testified that he tried to call Aishah through her mobile phone number but he heard a voice mail which informed him "This is a voice mail for the number …" and he switched off his phone and tried to call Aishah again repeatedly. Each time he called Aishah he heard the same voice mail and switched off his phone and tried to call her each time. He was asked and he testified that he did not leave any voice mail or message via her mobile phone to contact him or the police.

[29] After the warrants of arrest were issued and given to the police on 21 February 2013, the police did not do anything to trace or execute the warrants of arrest against the two witnesses until 15 March 2013. PW10 only received instructions to do so on 15 March 2013 at 4.30pm, that is after a lapse of about three weeks. The facts showed that PW10 did not immediately or for the next two days do anything to trace or execute the warrants of arrest against them. The facts showed that the continuation of the trial had been fixed for 18 March 2013 at 9am and PW10 only on 17 March 2013 at 9pm attempted to trace both witnesses. It was apparent that it was the first and a last minute attempt by the police to trace the witnesses.

[30] Although PW11 testified that he did not see Marina, Tadil and Aishah again after he had recorded their statements, the facts showed that they could be served with the subpoenas before the trial. Although PW11 said that he had taken all the necessary actions to locate Tadil and Aishah, he did not set out or explain what were the steps or actions taken by him to locate Tadil and Aishah. He did explain when was the last time the police had contacted them.

[31] Prior to and during the trial, the police did not publish any notice in the newspapers to trace them or to get the public to provide any information on the whereabouts of these two witnesses. PW10 and PW11 did not contact the Immigration Department to trace both witnesses. No other officers had tried to contact the Immigration Department or any other relevant authorities to trace both witnesses.

[32] According to PW11, Aishah had told him that she saw her father and brother (Tadil) at the scene and helped the deceased. Their father, Muin bin Hamsain, was also on the prosecution's list of witnesses. The

prosecution or police did not ask Muin bin Hamsain on the whereabouts of Tadil and Aishah. If the prosecution had asked Muin bin Hamsain he would have been able to tell or assist the prosecution on the whereabouts of these two witnesses. Muin bin Hamsain was not called as a witness. No evidence was led by the prosecution whether Muin bin Hamsain was available as a witness or was still in Miri or had also left Miri with his son and daughter (Tadil and Aishah). If Muin bin Hamsain was called to testify, he also could have explained whether the deceased had said anything to him on the incident but the prosecution did not do so and did not explain the gaps in the evidence.

[33] According to PW11 these two witnesses were very important witnesses to the prosecution's case. PW11 recorded their statements in August 2011, about a year ago before the commencement of the trial. PW11 knew that they were illegal immigrants from the Philippines and did not have any legal travel documents. PW11 or the prosecution should have taken steps or required Tadil and Aishah, even their father, to execute a bail to secure their appearance in court as witnesses when required but the prosecution did not do anything since 10 August 2011.

[34] The prosecution could have detained both witnesses as illegal immigrants either by the police or the Immigration Department until they were required to attend court as witnesses but the prosecution did not do so. There are sufficient provisions in the Criminal Procedure Code (CPC) to enable the prosecution to secure and ensure their attendance in court as witnesses but they did not do so.

[35] Based on the evidence before the court, the police did not employ due diligence and reasonable exertions to locate Tadil and Aishah as witnesses and to ensure their attendance in court as required. For the reasons given, the two statements of Tadil and Aishah should not and could not be admitted under s. 32(1)(i) EA: *PP v. Lee Jun Ho* [2009] 4 CLJ 90; [2011] 6 MLJ 220.

[36] Obviously what Tadil and Aishah had said to PW11 were hearsay and not admissible in evidence. They were not and could not be called as witness because they could not be located and had absconded. They did not testify in court what they had said to PW11, in particular as to the truth of what they had said to PW11, and they were not subject to cross-examination in the trial. Their allegations made to PW11 that the first and second accused persons together with Binajar had hit the deceased during the fight were not tested, were not corroborated and not safe as evidence against the first and second accuseds, especially in a capital offence made against them.

[37] Further, PW6 had earlier testified that Tadil told him that four persons had hit the deceased during the fight. What Tadil had said to PW6 that four persons had hit the deceased was different from what Tadil had said to PW11 that three persons had hit the deceased. There was no attempt by the prosecution to resolve or explain this discrepancy bearing in mind that both Tadil and Aishah were absent as witnesses during the trial. This discrepancy would raise some doubts as to what happened about the fighting on that night.

[38] PW11 had earlier testified that Tadil told him that Binajar told Tadil that the deceased "datang mengamok dan kami terus hantam dia." However, PW6 testified that Tadil told him that the deceased had asked for a loan from the suspects (see exh. P43). Obviously, what Tadil had said to PW11 about the incident was different from what Tadil had said to PW6 about the incident. Again, this discrepancy was not explained by the prosecution and raised some doubts as to what happened about the incident and as to the credibility of Tadil and Aishah.

[39] Similarly, what Marina had said to PW11 were also hearsay and not admissible in evidence. She was not called as a witness, the prosecution did not apply to tender her witness statement and the prosecution did not explain whether she was available as a witness or not. Similarly, what she said to PW11 was not tested and not subject to cross-examination as to the truth of what she had said to PW11.

[40] It was not in dispute and not in issue that Marina had pointed out where the knife, the cutter and the parang were kept and recovered at the house. The knife, the cutter and the parang as pointed out by Marina had been seized by the police. These were admissible evidence. However, what she had said to PW11 that the first accused had used the knife and that the second accused had used the cutter during the fighting were hearsay and not admissible as to the truths of what she said to PW11.

[41] The chemist report (exh. P4) showed that no blood was detected on the knife, cutter and parang. There was also no blood detected on the six cotton swabs which were used to swab the knife, cutter and parang. No DNA profile was developed from the cotton swabs marked as E1(2), E2(1), E3(1) and E3(2) (ie, exhs. P7B, P9B, P12B and P13B).

[42] Exhibit P4 showed that an unknown male DNA profile was developed from the cotton swab marked as E2(2) (exh. P10B). PW11 testified that he used the cotton stick (P10B) to swab the handle of the knife. This DNA profile did not belong to the first accused or the second accused but belonged to an unknown male person. This evidence

would negate the allegations of Tadil, Aishah and Marina that the first accused and or the second accused were holding or had used the knife against the deceased during the fight. The prosecution did not explain the presence of this unknown person.

[43] Was Binajar the unknown male person referred to in exh. P4? Did he use or handle the knife? However, PW11 testified that Marina, Tadil and Aishah had told him that it was Binajar who used the parang and not the knife. In that case this unknown male person was the fifth person in addition to the first accused, second accused, Binajar and Elni bin Usman already mentioned during the trial. Tadil had only referred to three or four persons who hit the deceased. He never said there was a fifth person but P4 clearly stated that there was an unknown male person who was involved.

[44] Exhibit P4 also showed that a DNA profile was developed from the cotton swab marked as E1(1) (exh. P6B). PW11 said that he used the cotton stick (P6B) to swab the edge of the cutter. The DNA profile developed from this cotton stick matched with the DNA profile from the blood specimen marked E19 (exh. P29B) belonging to the deceased.

[45] The evidence showed that the cutter was found at the back of the house. Marina told PW11 that the cutter was used by the second accused. However, the chemist report (P4) established that the second accused's DNA was not found or detected on the cutter although the deceased's DNA was found on the cutter. This would negate the allegations of Tadil, Aishah and Marina that the second accused was holding or had used the cutter against the deceased during the fight.

[46] Although the deceased's DNA was detected on the edge of the cutter, the prosecution did not explain how the deceased's DNA was found or detected on the cutter, whether the cutter was used to hit the deceased during the fight and if so, by whom or whether the deceased had used the cutter or had come into contact with the cutter and if so, when. The prosecution did not fill these gaps.

[47] PW7 had earlier testified that two persons had gone to his house to ask him to help them to send them to Mile 1, Kuala Baram. He did not know them and it was the first time that he saw them. He said he agreed to help them, although he did not know them, because they were all Suluks, they came from the same place and as Suluks they helped each other.

[48] As stated earlier, on 22 August 2011, the police interviewed PW7 about the two persons. PW7 testified that the police asked him whether he knew the name of the two persons and he said he did not know them. He said the police then told him that their name was Rocky and

Hamsa and that they had murdered a person. During his testimony, PW7 pointed to and identified the two accused persons sitting in the dock as the two persons who had gone to his house and whom he had sent to Mile 1, Kuala Baram. He testified he had subsequently saw and identified the two accused persons again at CPS Miri. He said it could be in an identification parade conducted by the police at CPS Miri.

[49] However, the learned DPP confirmed that the police did not conduct any identification parade for PW7 to identify the two accused persons. This contradicted his evidence that he saw and identified the two accused persons at CPS Miri in an identification parade. Subsequently, during his cross-examination and re-examination, PW7 testified that he could not identify the two accused persons as the two persons who went to his house on that night because it was dark, he did not know them and that was the first time he saw them. These raised some doubts that the two accused persons were the two suspects or persons who had gone to PW7's home to ask PW7 to assist to send them to Mile 1, Kuala Baram. Assuming that he was able to identify the two accused persons as the two persons who had gone to his house and had sent them to Mile 1, Kuala Baram, PW7 did not know and did not testify that the two accused persons had assaulted the deceased and had caused the death of the deceased.

[50] The existence of a common intention was a question of fact in each case to be proved mainly as a matter of inferences from the circumstances of the case. Invariably inferences have to be relied upon arising from such acts or conduct of the accused persons, the manner in which they arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was a common intention to commit the offence which the accused persons could be convicted: *Krishna Rao Gurumuthi v. PP & Another Appeal* [2009] 2 CLJ 603.

[51] What Binajar had allegedly said to Tadil and what Tadil had said to PW11 that the first and second accuseds together with Binajar had assaulted the deceased were hearsay as to the truth of what were said and not admissible. What 15 the deceased had allegedly said to Tadil and what Tadil had said to PW11 that the first and second accuseds had assaulted the deceased were hearsay as to the truth of what were said and not admissible. What Marina, Tadil and Aishah had allegedly said to PW11 that the first accused was holding the knife, that the second accused was holding the cutter and Binajar was holding the parang were hearsay as to the truth of what were said and not admissible. On the evidence presented by the prosecution, there was no

direct and or circumstantial evidence that the first and second accused persons had assaulted and/or had intentionally caused the death of the deceased.

[52] Therefore there was no evidence and the prosecution could not rely on the alleged dying declaration of the deceased that the two accused persons had caused his death. There was also no evidence that there was a plan or meeting of minds of all the accused persons to commit the offence for which they were charged. The prosecution had failed to establish that there was a common intention between the two accused persons together with another person who is still at large under s. 34 of the Penal Code.

[53] I have undertaken a maximum evaluation of the prosecution's evidence presented before the court. For the reasons given in this ruling, I am satisfied that the prosecution has not made out a *prima facie* case at the close of the prosecution's case against the first and second accused persons: Section 173(f), s. 180 CPC. The first and second accused persons are acquitted and discharged of the offence against them.